Hale v. *Henkel*, 201 U. S. 43, 74; *State* v. *Standard Oil Co.*, 218 Mo. 1. So one who becomes an officer of a corporation must be held to waive his privilege to this extent, that he must disclose such facts and produce such evidence as the corporation is required to disclose or produce through him as its proper agent. But see 3 WIGMORE, EVIDENCE, § 2259.

BOOK REVIEWS.

THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT. By Bruce Wyman, A.M., LL.B., Professor of Law in Harvard University. New York: Baker, Voorhis and Company. 1911. In two volumes. pp. ccxvii, xxvi, 1517.

After the great American text-books of the middle of the nineteenth century, which in more than one case rose to a position of quasi-authority and in many cases contributed not a little to the development of the law, a period of digest text-books set in, in which servile following of the letter of judicial decisions was taken to be a merit and it was assumed that a bare exposition of the points decided or a formulation of such points in abstract propositions was statement of "the law," and hence was the function of the practical law-writer. While these ideas prevailed, the boast of the careful writer was that he had cited all the cases; as to other matters, he could say, with the prologue to Alfred's Laws, "I durst not venture to set down in writing much of my own." The period was not one of juristic sterility, as the acute and well-reasoned discussions in legal periodicals of the time demonstrate. Until the mechanics of digest-making had been brought to what it is now, the text-book was needed to do the work of an index to the reports. Today, no text-book can compare with the digests and cyclopedias in this service, if for no other reason, because there is no way of keeping it continually up to date. In consequence text-books must be mere elementary sketches for students, or else must lead and guide as did the classical works of an earlier period, or they are not worth while. Professor Wigmore's treatise on Evidence has shown us that the time for texts which shall shape the law, and not merely mould headnotes or digest paragraphs into literary form, has by no means gone by. The influence which that book is exerting before our eyes witnesses that the law schools may do no less for the law today than they did in the classical days of Kent and Story and Greenleaf. Indeed, even more than that time, the present is a period of legal development. Professor Wyman is to be congratulated, therefore, upon the opportunity of expounding a great branch of the law, while its details are still formative and before its main outlines have rigidified, at a time when juristic development of the materials of the common law on a large scale has regained its place in our legal literature.

As the first to treat of the law of public service companies as a unit, the author has had the opportunities and has had to meet the difficulties of the pioneer. On the one hand, he has had free scope for analysis and for the working out and development of a consistent theory of his subject. On the other hand, in the construction and application of the theory, he has had to take many steps in the dark, or at least in what the common-law lawyer is likely to consider the dark — namely, the light of pure juristic theory. But the time has come for many steps in that light in more than one department of our law.

Obviously the older method of calling this or that a common carrier by analogy, so that the test of a public calling might be how far it could be put in the category of common carrier without too violent straining of fiction, was

impossible except as a temporary device. For a time the analogy served well enough. But industrial development has produced a large number of callings that require a broader principle and a more rational treatment. As a result of historical inquiry on the one hand and of analysis of the modern decisions upon the other, Professor Wyman finds this principle in legal regulation of public callings by imposing general affirmative duties upon those engaged therein over and above the negative duties of a general character which the law imposes upon private persons. In other words, the person engaged in such a calling is not dealt with as a normal or standard person. He is put in a class by himself and, if one may take such a liberty with a well-known phrase, what is law for him is not law for the average person. In the law of torts, we find a number of duties toward all men of a negative character, such as to refrain from intentional injury to others, to refrain from negligent injury to others, not to permit injurious operation of certain dangerous agencies made use of at one's peril, and the like. As to other matters, the duties of the ordinary man depend, for the most part, upon his voluntary assumption of them. But one who is engaged in a public calling, in addition to the general negative duties resting upon all men, is subject to general affirmative duties imposed directly by law. The reason for the imposition of these duties, and so the criterion of a public calling, the author finds in monopoly, state-granted, natural, or virtual, of some matter (not necessarily service) of general need under conditions of life and of commercial and industrial activity for the time being. The history of the common law shows that at different periods courts have differed much as to what are public callings, and that the reasons of such differences are to be found in diverse economic conditions. The question is not, therefore, what has been held at some time or other to be a public calling or the reverse, but rather what has been the principle upon which at bottom judicial determinations of the nature of various callings have proceeded. The case of state-granted monopoly, or, as Professor Wyman puts it, monopoly due to legal privilege, is clear enough. The other classes of cases, natural monopoly and virtual monopoly, require more consideration.

Natural monopoly, we are told, may be due to restriction of supply, scarcity of sites, limitations of time within which the needs of patrons must be met, if at all, and difficulty of distribution. Here the nature of the service rendered involves power of extortion or oppression in those who render it, and so demands legal regulation in the public interest. Virtual monopoly, we are told, may exist because of cost of plant, the large scale on which service is performed, the inadequacy of available substitutes, or the dependence of the service rendered upon other activities. In these cases, although obviously the line cannot be drawn sharply, it is not the nature of the undertaking itself but the circumstances in which it is carried on in the time and jurisdiction in question that determine the decision. Hence the question must be largely one of fact. "If," says the author, "monopoly is made out as the permanent condition of affairs in a given business, then the law will consider that calling public in its nature. On the other hand, if effective competition is proved as the regular course of things in a given industry, the law will hold all businesses within it as private in their character."

Probably the second category, natural monopoly, will be accepted by all but a few obstinate adherents to nineteenth-century economic ideas. With respect to the third, virtual monopoly, there are likely to be many who will hesitate. To some the conception that the same business, involving no state-granted privilege and no natural monopoly, may or may not be public, according to the relative permanence of a condition of effective competition, will grate upon a feeling that the law is from eternity and that a legal system must settle that every calling is abstractly the one thing or the other. To others, the conception of virtual monopoly will seem to involve danger of an undue

extension of the class of public callings and hence of state interference. But our law must come more and more in every department to just such flexible conceptions as this. Abstract hard and fast categories seldom have much relation to actual conditions to which law is to be applied. If cases are crammed into them with logical rigor, injustice results. If the severity of logic is relaxed, our hard and fast dogmas achieve nothing; we have one law in the books and another, or sometimes none, in practice. Such subjects as the one in hand, involving economic and social questions at so many points, require a few clear principles rather than a mass of rigorous rules, if the law is to deal with them effectively. As to the other point, perhaps the limitation to cases of necessity will meet reasonable objections. In case of natural monopoly, the author points out that the basis is public need. "This extraordinary activity of the state on behalf of the individual," he says, "is . . . confined to necessary services." It is true this also is a very flexible criterion. But so are many of the most useful doctrines of our law. Such conceptions as reasonable time are worth a multitude of sharply drawn rules. Moreover flexible principles such as those in question appear to stand the test of application to every phase of the subject throughout the book.

Lawyers and students of American legislation will agree, no doubt, in approving the author's insistence upon the sufficiency of the common law for the whole subject of public callings. The affirmative duties which the common law imposes upon those engaged in these callings, if enforced, would clearly meet every reasonable requirement. But the common-law machinery for enforcing these duties has proved cumbrous and ineffective. Assuming mistakenly that the law was inadequate, legislators have multiplied statutes on matters of substance which have achieved little because directed to the wrong point. Indeed, they have added difficulties of interpretation to difficulties of enforcement and application already existing. It is not too much to say, as the author says, that "the common law is adequate to deal with all real industrial wrongs," provided we address ourselves vigorously and intelligently to the difficult problem of enforcement. Until we do this, eulogy of the common law will be lost upon an impatient public.

The work of preparing an adequate treatise upon so large a subject under American conditions, which require a canvassing of the huge annual judicial output of some fifty jurisdictions, may well give pause to one who would think about cases as well as collect them. Hence the author need not remind us that he has been hurried in producing his book at this period in the development of the subject. Undoubtedly it is of advantage to have such a work today rather than tomorrow or the day after. And yet one can only regret that so good a book should have to go forth with so many marks of hasty preparation. A style at times very colloquial, *naïvetés* such as the statements in the preface that the author has "had a policy of a sort" in choosing the cases to be cited and that he is "rather proud" of his analysis, and repetitions of the same matter in the very same words in different connections (*e. g.* preface, p. vi, repeated in § 35, preface, p. viii, repeated in § 42, the paragraph at the bottom of p. ix, repeated in part on p. 29), are easily accounted for by the exigencies of dictation, but are regrettable blemishes upon a performance which in other respects is admirable. R. P.

LAW OF REAL PROPERTY: Chiefly in Relation to Conveyancing. By Henry William Challis. Third edition, by Charles Sweet of Lincoln's Inn. London: Butterworth and Company. 1911. pp. xlv, 524.

Of all English writers on the law Mr. Challis most resembles Littleton. In both we find a mathematical exactness and an absence of every unnecessary word, coupled with a limpid, and one may almost say a flowing, style.